IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 11.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian,

Petitioner,

vs.

MANUFACTURERS TRUST COMPANY.

No. 15.

MANUFACTURERS TRUST COMPANY,

Petitioner,

vs.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT IN NO. 11 AND FOR THE PETITIONER IN NO. 15.

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On Brief.

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Opinion Below.

The opinion of the Court of Appeals for the Second Circuit (R. 17-24) is reported at 169 F. 2d 932. The District Court rendered no opinion.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on August 5, 1948 (R. 24). Cross-petitions for writs of certiorari were filed by the Solicitor General, on behalf of the Attorney General, as successor to the Alien Property Custodian,[1] on October 29, 1948, and by Manufacturers Trust Company on December 2, 1948. Both petitions were denied on January 17, 1949. The Solicitor General, on behalf of the Attorney General, filed a petition for rehearing on June 16, 1949. In its petition filed June 22, 1949 Manufacturers Trust Company asked that, if the Attorney General's petition for rehearing should be granted, rehearing be granted also of the denial of Manufacturers Trust Company's petition for writ of certiorari. On June 27, 1949 both petitions for rehearing were granted, the orders denying certiorari were vacated, and certiorari was granted in both cases.

The jurisdiction of this Court is invoked under Sec. 1254 of Title 28 of the United States Code.

Statutes Involved.

Secs. 5 (b), 7 (c) and 8 (a) of the Trading with the Enemy Act as amended, are set forth in the appendix of Custodian's brief (pp. 44 to 47). Sec. 17 of said Act is set forth in the appendix, *infra*, page 29.

[1] In this brief the term "Custodian" will be used to refer to either the Alien Property Custodian or the Attorney General as his successor.

Summary Statement.

On October 31, 1941 Manufacturers Trust Company (hereinafter called "the Bank") filed a report with the Treasury Department that as of June 14, 1941, the sum of $39,589 stood to the credit of Reichsbank Direktorium (hereinafter called the "Reichsbank") (R. 5). In the said report the Bank also stated erroneously that on June 1, 1940, as well as on June 14, 1941, the Reichsbank was not indebted to it and that no adverse claims existed or were asserted with respect to the aforementioned indebtedness (R. 6).

On February 1, 1946 the Custodian issued Vesting Order No. 5791 vesting the interest of the Reichsbank in the indebtedness arising out of the dollar account maintained by the Reichsbank with the Bank and any and all rights to demand, enforce, and collect the same. The vesting order made no demand for payment but provided that the vested property should be held pending further determination by the Custodian (R. 7, 8).

Upon receipt of a copy of Vesting Order No. 5791, the Bank, in its letter dated April 8, 1946, advised the Custodian that, as it previously informed his representative, while the sum of $25,581.49 stood to the credit of the Reichsbank's account with the Bank, the Reichsbank was indebted to the Bank in a sum far in excess of said balance on an obligation long past due, and that, therefore, there was no credit balance available to the Reichsbank (R. 9).

On January 30, 1947 the Custodian issued a turnover directive in which he determined that at the

time of the issuance of the vesting order, the Bank was indebted to the Reichsbank in the sum of $25,581.49; that there were no valid offsets or counterclaims thereto; and that the said sum is property which is in the possession of the Bank and which was vested by Vesting Order No. 5791, and demanded that the Bank turn over the said property to the Custodian (R. 9-11).

On October 29, 1947, on the petition of the Custodian, the District Court ordered the Bank to show cause why an order should not be made directing the Bank to comply with Vesting Order No. 5791 and demands based thereon (R. 2). In its answer to the petition, the Bank alleged that the Reichsbank was an instrumentality and part of the German Government which had guaranteed to the Bank payment of debts of various German banks to the Bank; that on June 14, 1941 the indebtedness of the said banks to the Bank was in excess of $25,581.49 and that, therefore, on the date of the issuance of the vesting order the Bank was not indebted to the Reichsbank in the sum of $25,581.49 or any other sum (R. 12-14).

On December 12, 1947 the District Court of the United States for the Southern District of New York (Coxe, *J.*) directed the Bank to pay $25,581.49, with interest at six per cent from the date of the service of the turnover directive (R. 15). On appeal by the Bank, the Court of Appeals for the Second Circuit unanimously affirmed the order of the District Court insofar as it directed payment of $25,581.49, but the majority (Swan and Frank, *JJ.*) held that the Custodian was entitled to interest only from the date on which the District Court entered its order (R.

17-24). In the opinion, Swan, *J.*, stated that the consequences of giving the Custodian the power to call property into existence for the purpose of seizure by his own *ex parte* action are exceedingly drastic and that if a putative debtor denies the existence of any debt whatever, the Court would hesitate to hold that the Custodian's power extends so far as to make his *ex parte* determination that there is a debt and the amount of it conclusive in a proceeding under Sec. 17 of the Trading with the Enemy Act (hereinafter referred to as the "Act"). The affirmance, however, was based upon the holding that the set-off claim of the Bank was not a denial of the Reichsbank's claim for the amount of its deposit but the assertion of an independent claim which should be litigated in a proceeding instituted under Sec. 9 of the Act (R. 21, 22).

In No. 11 the Custodian has petitioned to review the decision of the Court of Appeals insofar as it reversed the decision of the District Court and denied the Custodian's claim to interest prior to the entry of the District Court order. In No. 15 the Bank has petitioned to review the decision of the Court of Appeals insofar as it affirmed the decision of the District Court and directed immediate payment to the Custodian of the principal sum demanded.

Questions Presented.

The following questions are presented:

1. Whether the Custodian who vested an enemy's interest in a debt claimed to be due to the enemy can, by his own action, determine the existence and amount of the debt notwithstanding the alleged debtor's de-

nial of the existence of any debt to the enemy, and summarily enforce payment of the amount so found by him to be due to the enemy.

2. Whether, in a proceeding under Paragraph 17 of the Act, the Custodian's determination as to the existence and amount of a disputed debt is conclusive.

3. Whether the Bank's right of set-off of the depositor's matured indebtedness to it in excess of the deposit balance, extinguishes the Bank's indebtedness to the depositor for the deposit balance and makes the deposit balance unavailable to the depositor and to the Custodian as the successor of the depositor's interest in the deposit balance.

4. Whether Sec. 8 (a) of the Act protects a lienor's possession of property subject to lien against seizure by the Custodian.

5. Whether the Bank's right to hold and apply a deposit balance in payment of a depositor's indebtedness to it is a right in the nature of a security interest in property within the purview of Sec. 8 (a) of the Act.

6. Whether the Custodian is entitled to interest from the date of the service of the turnover directive.

Specifications of Error.

The Bank having denied the existence of any indebtedness to the Reichsbank at the time of the issuance of the vesting order, the Custodian could not summarily enforce payment of the debt claimed by him to be owing to the Reichsbank without first establishing the existence and amount of the debt in a sepa-

rate proceeding. The District Court had no summary power to direct payment of the disputed debt and the affirmance of that part of its order by the Court of Appeals for the Second Circuit was erroneous.

Summary of Argument.

In this action the Custodian seeks summarily to compel payment of a debt which he determined to be owing to an enemy, the existence of which is denied by the alleged debtor. By the issuance of the vesting order the Custodian seized the debt which the Bank owed the Reichsbank, if any. The Custodian has no greater right than the enemy depositor to demand repayment of the deposit balance allegedly due to the depositor and to enforce payment thereof. If the balance was unavailable to the Reichsbank upon the demand, it was likewise unavailable to the Custodian.

The Bank at no time held any moneys of the depositor. The Bank was a debtor of the Reichsbank for the amount of the deposit balance and the Reichsbank, in turn, was a debtor of the Bank as a guarantor of payment of a matured indebtedness. A banker's right to hold and apply a deposit balance in satisfaction of a depositor's past due obligation is a substantial right which may be enforced without the aid of the Court.

While in its report to the Treasury Department the Bank originally reported that the Reichsbank was not indebted to it, it subsequently advised the Custodian of its error. A report made to the Government is not conclusive and does not preclude the person making the report from showing the true facts.

In this proceeding the Custodian is not seeking to compel delivery of a chattel but to compel payment of

a debt and the many decisions which hold that the Custodian has the power to summarily compel delivery of property determined by him to be held for an enemy are inapplicable. A summary enforcement of a debt allegedly due to an enemy is, in effect, a levy upon the putative debtor's property for the satisfaction of the alleged debt. The Custodian may summarily enforce payment of an acknowledged debt to an enemy. However, if a debt is disputed, the Custodian may not lawfully compel the application of property of the putative debtor to the satisfaction of the claimed debt without first establishing the existence and the amount of the debt.

The Custodian's erroneous seizure of a putative debtor's property for the satisfaction of a debt allegedly due to an enemy is not remediable under Sec. 9 of the Act.

In a summary proceeding instituted by the Custodian under Sec. 17 of the Act to compel delivery of property, respondent has a right to show that he does not have the property. Similarly, in a proceeding to compel payment of a debt allegedly due to an enemy, the alleged debtor also has a right to challenge the Custodian's determination as to the existence of the debt and to show that by reason of a set-off of mutual debits and credits he is not indebted to the enemy.

The Bank can also resist the issuance of an order directing it to comply with the Custodian's demand by invoking Sec. 8 (a) of the Act, which protects the right of possession of a person having a right in the nature of security in the property of an enemy. A bank's right to hold a deposit balance for application against any matured indebtedness is in the nature of a lien for the security and protection of the bank.

The Custodian is not entitled to interest between the date of the issuance of the turnover order and the entry of a judgment in this proceeding. The proceeding under Sec. 17 of the Act is not a proceeding to enforce payment of an obligation due to the United States but to obtain possession of enemy property. At the time of the entry of the judgment directing the Bank to comply with the Custodian's demand, the Custodian was merely authorized to hold the enemy property seized by him pending further determination by Congress of the use to be made thereof. Interest should, therefore, not be exacted to compensate the Custodian for the loss of use of the amount ordered to be paid. The Act makes no provision for payment of interest or any other penalty in the event of noncompliance with the Custodian's demand. The Custodian is not entitled to interest by way of penalty for noncompliance, particularly since the Bank's refusal to comply with the demand was not capricious.

POINT I.

Upon vesting of an enemy's title and right to a debt, the Custodian cannot summarily compel payment of the amount claimed by him to be due to the enemy if the existence of the indebtedness is disputed by the putative debtor.

Secs. 5 and 7 of the Act empower the Custodian to vest any property, including debts.

Sec. 17 of the Act[2] confers jurisdiction upon District Courts of the United States to enforce the Act by the issuance of such orders and decrees as may be

[2] Appendix, p. 29.

necessary. The said section did not confer upon the Custodian the right to institute summary proceedings in all instances. The circumstances of a particular case determine whether the Custodian should resort to a summary proceeding or a plenary suit.

By the issuance of Vesting Order No. 5791, the Custodian captured whatever right the Reichsbank had to demand from the Bank payment of the deposit balance. The vesting order had the legal effect of transferring to the Custodian the interest and right of the enemy as they then existed.

The Bank at first erroneously reported to the Treasury Department that a deposit balance in the sum of $39,589 stood to the Reichsbank's credit with it and that the Reichsbank was not indebted to it. Subsequently, in a statement made to the Custodian's representative and in its letter to the Custodian dated April 8, 1946 and in its answer in this proceeding the Bank denied that, as of the date of the vesting order, it was indebted to the Reichsbank in any sum whatever. In its letter dated April 8, 1946 the Bank stated that while it was indebted to the Reichsbank in the sum of $25,581.49, the Reichsbank was indebted to it on a past due obligation in excess of said sum and that, therefore, there was no balance available to the Reichsbank nor in turn to the Custodian (R. 9).

In its answer in this proceeding (R. 14) the Bank stated that on June 14, 1941, the principal obligors were indebted to the Bank in excess of the amount of the Reichsbank's deposit balance and hence the Reichsbank's obligation as guarantor of said obligations was in existence on said date.

A report or a statement made to the Government is not conclusive and does not preclude the person

making the report from showing the true facts (*Schall* v. *Miller*, 287 Fed. 502; *Simon* v. *Miller*, 298 Fed. 520).

The Custodian could not have been prejudiced by the Bank's report to the Treasury Department. This summary proceeding is based upon the Custodian's determination that the Bank was indebted to the Reichsbank in the sum of $25,581.49. Obviously, this determination was not made on the basis of the report filed by the Bank with the Treasury Department but on the Bank's statement in its letter of April 8, 1946 that the Bank was indebted to the Reichsbank in the sum of $25,581.49. However, in the very same letter the Bank advised the Custodian that the deposit balance was not available to the Reichsbank and that it was not indebted to the Reichsbank in any sum whatever because the Reichsbank was indebted to the Bank on a past due obligation in a much larger sum.

Despite the Bank's denial of any indebtedness to the Reichsbank, the Custodian seeks summarily to compel payment of a debt which he determined to be due to the enemy.

The Act only grants to the Custodian the power to seize an existing debt and to compel its payment upon the determination that it is owing to an enemy. The Act does not, however, empower the Custodian to determine conclusively the existence and extent of the debt for the purpose of compelling its payment by the putative debtor.

There is a difference between vesting and obtaining delivery of tangible property and the vesting and enforcing of payment of a debt. The vesting of tangible property determined to be enemy-owned is a seizure

of such property and the Custodian may summarily compel delivery of the enemy property. The vesting of a debt is in the nature of a garnishment and the summary proceeding to compel satisfaction of the debt alleged to be garnished is a proceeding to enforce payment out of non-enemy property (*Simon* v. *Miller*, 298 Fed. 520).

If the debt is admitted, no reason exists why the Custodian should not have the power to initiate a summary proceeding to compel its payment. However, if the debt is disputed, the Custodian may not resort to a summary proceeding to compel payment of the debt alleged by him to be due to the enemy. He may either establish the existence and extent of the debt in a separate proceeding and then summarily enforce its payment or he may institute a plenary action under Sec. 17 of the Act both to establish the debt and compel payment thereof by appropriate decree.

At page 9 of his brief, the Custodian admits that in many cases he is content to permit an adjudication of the title and interest of the enemy prior to reduction of the property to possession. Such prior adjudication should be obtained by the Custodian in all cases where the debt is disputed.

In *Simon* v. *Miller*, *supra*, even as here, the Custodian argued that he had the power to state the account between the alleged debtor and the enemy and compel payment of the balance found by him to be due. The Custodian argued that if, in fact, he had power to demand delivery of chattels whether or not they were enemy owned, it would be no more drastic to compel payment of a balance resulting from an

account stated by the Custodian. Judge Learned Hand answered this argument as follows (p. 523):

> "The consequences of such a power are excessively drastic, and would indeed be extravagant in operation. The Custodian might, in the case of the breach of a contract for the sale of goods or for their manufacture, undertake a liquidation of damages which, however honest, would have no relation to what should eventually be recovered. How could such a finding be enforced? The debtor must collect money to pay it, and if he had none, must sell his goods till he got in hand the necessary cash. That is in fact execution *in limine*, a loss scarcely remediable by suit under section 9. It contradicts all our notions of the rights of putative debtors who dispute the debt; it has no analogy in those possessory suits on which reliance was put, in part anyway, in *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. Ed. 403. Rather one would look to the common procedure in garnishment, by which a discharge of the debt is paralyzed, and the asset effectively sequestered, until any controversy as to its existence or amount can be determined.

Nor does it seem to me that any such interpretation is called for by the general purposes of the legislation in question. Captures had a double purpose. They changed the title in any actual rights which the enemy might have in the captured property, and they sequestered the property itself in which those rights might inhere. The plaintiff concedes that the demand of June 1, 1920, gave title to the Custodian to all Albert's

rights to the account; he disputes, however, that after the Custodian's statement of the account his individual assets might be sequestered to pay the balance found. The summary power to sequester property depends upon the protection necessary to secure the United States in the assertion of its eventual right by capture; the property must be held in custody until any disputes shall be determined, just as is done in replevin or attachment. In the case of chattels or tenements this involves possession *ad interim* of the property itself, since otherwise the chattel might be delivered or the profits collected and disbursed. That would make ineffectual any final decree of title.

But these considerations cannot apply to the capture of a debt. A creditor has no rights in his debtor's assets and is not concerned with their fate. The debt remains a general obligation, regardless of their disposition. Whatever makes invalid any payment by the debtor protects the captor of the debt. No possession is necessary, because none is possible; the captor is secure so long as the debtor cannot discharge the debt. How, then, can it be argued that the scheme of the act involved a payment of the debt *in praesenti?* The captor being protected, why must the debtor be exposed to execution *in limine?*"

Although *Simon* v. *Miller* was an action pursuant to Sec. 9 of the Act, the instant case is indistinguishable in principle. Simon at first reported that a balance standing to his credit with the bank represented moneys which he owed to an enemy. However,

he later declared that his prior report was made through error and that the said balance did not represent his balance to the enemy because the enemy was indebted to him in a sum in excess thereof. The Custodian did not obtain the amount claimed to be the enemy's from Simon but obtained it from the bank where it was on deposit to Simon's credit. Simon had no opportunity to resist the Custodian's capture and had to resort to a proceeding under Sec. 9 of the Act to obtain restitution. Learned Hand, *J.*, held that the proceeding instituted by Simon was analogous to an application to vacate an attachment improperly levied; that the power of the Custodian did not extend beyond the right to attach the enemy's claim and did not include the right to state an account and to compel payment of the balance found by him; that, accordingly, the seizure was unauthorized and unlawful; that while the plaintiff's change of position as to the balance due was a suspicious circumstance, nevertheless it could not subject plaintiff to summary execution upon its obligation, and directed the Custodian to pay the seized amount to plaintiff.

Grave injustice may stem from the grant of such extravagant and unnecessary power and in many cases the exercise thereof would not be remediable, *Clark* v. *E. J. Lavino & Co.*, 72 F. Supp. 497, to the contrary notwithstanding. The Court below stated that it would "hesitate to hold that the Custodian's power extends so far as to make his *ex parte* determination that there is a debt and the amount of it conclusive in the proceeding under Section 17" (R. 21) and that "the consequences of giving the Custodian such a power are exceedingly drastic". (R. 20).

The Custodian admits that if the debtor does not in fact have the cash demanded, severe hardship might result from a summary enforcement of his demand, but states that the possibility of such hardship would unquestionably be taken into consideration by the Custodian in considering whether resort to summary proceeding was appropriate (Custodian's Br. 15).

Such wide discretionary power should not be granted to the Custodian where there is no real need for it. He should be compelled in all cases where the debt is disputed to resort to a plenary action for the purpose of establishing the existence and the extent of the debt before compelling payment thereof. The Custodian rests his claim to such extravagant power upon the imperative necessities involved in the exercise of his war power. No imperative necessity exists here. The deposit balance was not available to the enemy after June 14, 1941, the date of issuance of Executive Order 8389 which prohibited transfer of property of a German national without a license. The vesting order was issued on February 1, 1946. The turnover directive which contained a demand for payment was not issued by the Custodian until January 30, 1947, after the cessation of hostilities. The proceeding under Sec. 17 was not instituted until October 29, 1947.

In this proceeding the Bank is not asserting an adverse claim to property seized by the Custodian. It is merely asserting that an order may not be issued directing the Bank to pay a debt which, in effect, did not exist.

The Custodian contends that this is a proceeding to enforce a demand for possession of vested property. At the time of the issuance of the vesting order and of the turnover directive, the Bank did not have in

its possession any moneys or other tangible property which it held for the Reichsbank. Title to any money deposited in a bank account passes to the bank and the relationship becomes one of debtor and creditor (*New York County National Bank v. Massey*, 192 U. S. 138, 145; *Straus, et al. v. The Tradesmen's National Bank of New York*, 122 N. Y. 379, 382).

In *United States v. Bank of United States*, 5 F. Supp. 942 (S. D. N. Y.), the Commissioner of Internal Revenue, having previously made a levy upon a deposit balance allegedly due to a delinquent taxpayer, instituted a proceeding to compel payment of the deposit balance. Woolsey, *J.*, held that since at the time of the levy the depositor was indebted to the Bank on a past due obligation in excess of the amount of such balance, "the result of this is that there really was not any chose in action in existence on which the Government could levy because there was nothing owing from the bank".

Even in a summary proceeding for delivery of tangible property, the alleged holder of the property will be heard to say that an order should not be issued because at the time of the vesting order he did not have the property in his possession.

POINT II.

The Reichsbank's deposit balance was not available or payable to the Reichsbank nor to the Custodian as the captor of the Reichsbank's rights.

A deposit in a bank creates a debtor and creditor relationship between the bank and its depositor. The bank may, at will, apply the deposit balance upon any obligation then due it from the depositor.

Studley v. *Boylston Nat. Bank of Boston*, 229 U. S. 523;
Straus et al. v. *The Tradesmen's National Bank of New York*, 122 N. Y. 379;
Falkland v. *St. Nicholas Nat. Bank of New York*, 84 N. Y. 145, 149.

While some courts have held the contrary view, many jurisdictions, including New York, hold that a deposit balance may be off-set against a matured debt of a depositor which, though originally contingent had become absolute at the time of the application of the balance.

Davis v. *Standard National Bank*, 50 App. Div. 210, 212;
New York Title & Mortgage Co. v. *Irving Trust Co.*, 241 App. Div. 246, aff'd 268 N. Y. 547;
Van Schaick v. *Pennsylvania Exchange Bank*, 236 App. Div. 453;
Citizens National Bank v. *Wills*, 130 N. J. L. 201, 31 A. 2d 820;

Page Trust Company v. *Wachovia Bank & Trust*, 188 N. C. 766, 125 S. E. 536;
Millhouse v. *Citizens Bank of Valdosta*, 14 Ga. App. 240, 80 S. E. 703;
Munday v. *Bank of Franklin*, 211 N. C. 276, 189 S. E. 779;
7 *Zollman, Banks and Banking*, §4590, at p. 176;
5 *Michie, Banks and Banking*, p. 247;
37 A. L. R. 578;
7 *Amer. Juris. Banks*, §645.

In *Wills* v. *Citizens National Bank*, 125 N. J. L. 546, 16 A. 2d 804, cited at page 19 of Custodian's Brief, the bank was not permitted to set off the deposit balance against the depositor's liability as endorser of the note which had not yet been fixed by protest, but in the later decision, *Citizens National Bank* v. *Wills*, *supra*, the set-off was upheld once the liability had been so fixed.

In *Long Island Bank* v. *Townsend*, Hill & D. Supp. 204 (N. Y.), the only New York case cited by the Custodian (Custodian's Br. 19), the set-off was denied because the bank sought to apply the deposit balance of one of two joint obligors, hence mutuality was lacking.

On June 14, 1941, the obligations of the principal obligors were past due and the Reichsbank's obligation to the Bank was absolute.

The Custodian argues that the Reichsbank was not a part of the German Government and that therefore it was not in effect the guarantor. The Bank's allegation that the Reichsbank is an instrumentality of the

German Government was not controverted by any proof offered in the District Court and is not an issue in this proceeding. That would have been one of the main issues in the plenary suit which the Custodian should have instituted.

The crucial phrase in the majority opinion of the Court of Appeals insofar as the present controversy is concerned is that "a set-off at law is a money demand independent of and unconnected with the plaintiff's cause of action", that the "assertion by the Bank of a right of set-off is not a denial of the Reichsbank's claim for the amount of its deposit", and that the Bank "must have recourse to Sec. 9 to litigate its asserted right of set-off" (R. 32).

The decision of the Court below was contrary to the modern view of the Bank's right of set-off as understood by the commercial community and by the courts.

According to the modern view, a bank's right of set-off is a matter of substantive right and not procedure. *First National Bank of Indianola* v. *Malone*, 76 F. 2d 251.

This right is not limited in its exercise to the pleading of a counterclaim in an action but is enforceable by the bank's own act without the aid of a court. *Studley* v. *Boylston Nat. Bank of Boston*, 229 U. S. 523; *Gonsalves* v. *Bank of America National Trust and Savings Association*, 16 Cal. 2d 169, 105 P. 2d 118; *Jefferson County National Bank* v. *Dauskas*, 166 Misc. 720.

The practical effect of a set-off arising from the existence of mutual demands is the satisfaction and

extinguishment of the cross demands, leaving only the resulting balance as the true amount of the indebtedness from the one party to the other. *Bank of Marysville* v. *Marysville Windisch Mulhauser Brewing Co.*, 50 Ohio State 151, 33 N. E. 1054; *Long Beach Trust Co.* v. *Warshaw*, 264 N. Y. 331; *Commercial Bank of Albany* v. *Hughes*, 17 Wended 94; *Ware, as Administrator* v. *Hawley*, 68 Ia. 63, 27 N. W. 788, 789.

If the depositor is, in fact, indebted to a bank, the bank may exercise its right of set-off; that the transaction is not on the books of the bank or that an official of the bank does not know of its existence is immaterial on the issue of the indebtedness. *Walser* v. *International Union Bank*, 21 F. 2d 294, 296.

When the Court of Appeals stated that the assertion by the Bank of a right of set-off is not a denial of the Reichsbank's claim and that the Bank should litigate its right of set-off in the proceeding brought under Sec. 9 to obtain a return of the moneys paid to the Custodian, it took an inconsistent position.

Restitution in a Sec. 9 proceeding can be had only upon a showing that the Custodian seized the Bank's own funds. This presupposes that the Bank had the right to set-off the Reichsbank's deposit balance and that the assertion of the right of set-off is a denial of the indebtedness to the Reichsbank. On the other hand, if the claimed set-off of the Bank is merely an independent claim in the nature of a counterclaim, then the assertion of that right would not constitute a basis for obtaining repayment of the moneys paid to the Custodian in a Sec. 9 proceeding and relegating the Bank to a Sec. 9 proceeding affords the Bank no relief.

The Courts have at all times been solicitous in protecting the banks' rights of set-off. In no other proceeding has a bank been compelled to pay a deposit balance and to litigate its right of set-off thereafter.

POINT III.

The Bank's security interest in the Reichsbank's deposit balance is exempt from seizure by Section 8 (a) of the Act.

Sec. 8 (a) (p. 46, Custodian's Br.) provides that any person not an enemy or an ally of an enemy holding a right in the nature of security in the property of an enemy which may be disposed of on notice or presentation or demand may continue to hold the said property and after default may dispose thereof in accordance with law and that where the demand is a prerequisite to the liquidation of the property said demand may be made upon the Custodian.

When language of a statute is clear, as this is, no evidence of legislative intention can control its construction. *Cammanetti v. United States*, 242 U. S. 470; *R. R. Commission v. Chicago B. & O. R. Co.*, 257 U. S. 563.

The purpose of this Section is twofold, one, to protect a lienor's possession, and, two, to perfect the lienor's right to liquidate the property subject to lien despite the inaccessibility of the debtor.

There is no anomaly between the provisions of Sec. 8 (a) and Secs. 5 and 7 of the Act. By vesting enemy property which is subject to a lien the Custo-

dian does not seize the property but only the equity of the lienee. The vesting order prevents the use of the property by the enemy. The Act is not intended to interfere with rights of non-enemies. Neither the lienor, nor the Custodian as a successor to the lienor's rights may interfere with the right of the lienor to realize the debt out of the property.

In *Silesian American Corporation* v. *Markham*, 156 F. 2d 793, 797, Learned Hand, *C. J.*, stated that Sec. 8 (a) protects an American pledgee against seizure of the pledged property and forbids the disturbance of the pledgee's possession by the Custodian.

The protection afforded by Sec. 8 (a) is not confined to mortgages, pledges or similar liens but to any security interest in the enemy's property.

In *Mayer* v. *Garvan*, 270 F. 229, an American partner of an enemy asserted that he had a right to retain the partnership assets for the satisfaction of his interest in the partnership. Bingham, *C. J.*, held that the American partner had a partner's lien on the partnership assets after the payment of partnership liabilities and stated at page 239:

> "His (Custodian's) right of seizure did not extend to dispossessing the plaintiff of the American assets, for Section 8 (a) of the act entitled the plaintiff to continue to hold the property and to liquidate the same to satisfy his interests and to pay over the surplus or what belonged to the enemy partners to the custodian."

In *Standard Oil Co.* v. *Markham*, 64 F. Supp. 656, 665, it was held that an agent has a right to retain property of his principal of which he gained pos-

session in the execution of the agency, that "such a valid acquired lien is effective against the United States and the Custodian".

The Custodian concedes that the claimed right of set-off would give the Bank a right to withhold payment of the deposit balance (p. 31).

Under New York decisions a bank has a lien on the deposit balance. *Falkland* v. *St. Nicholas National Bank of New York*, 84 N. Y. 145, 149; *Delehanty* v. *Central National Bank*, 63 App. Div. 177.

In *Wright* v. *Seaboard Oil & Manganese Corporation*, 272 F. 807, the Court of Appeals, Second Circuit, recognized that a bank has a lien on a deposit balance and stated that "it makes no difference whether the lien has its origin in the contract or arises by operation of law."

Some courts state that the bank's right to hold and apply its depositor's deposit balance is a lien. Other courts call it a pledge (*In re Estate of Browning*, 189 Minn. 375), collateral security (*Fisher* v. *Continental Bank*, 64 F. 707; *Brown* v. *Maguire's Real Estate Agency*, 343 Mo. 326), assignment of a chose in action as collateral (*Marion National Bank* v. *Smith*, 170 Ga. 332). Irrespective of what that right is called, the courts have been solicitous in protecting the bank's right to control the deposit balance for the purpose of set-off and they recognize that a bank has a security interest in the balance.

In *Gonsalves* v. *Bank of America Nat. Trust & Sav. Ass'n.*, 16 Cal. 2d 169, 105 Pac. 2d 118, referring to a banker's lien, the Court stated at page 12:

"Despite the technical inaccuracy involved in

calling it a lien, it is in the nature of a lien or security interest in the funds, similar to and enforceable in the same way as the lien against commercial paper."

The contention of the Custodian and the Court of Appeals, that one cannot have a lien on his own property, is misleading and beside the point. Security rights are not claimed in the money deposited, which has already become the property of the Bank, but in the depositor's ownership and right of disposition of the deposit. A deposit creates a chose in action in favor of the depositor which may be assigned voluntarily or *in invitum*. It is upon that chose in action that the Bank has its lien.

It is evident from the plain language of Sec. 8 (a) that it was the intent of Congress not to impair the subsequent rights of creditors having any interest in the property sought to be seized by the Custodian.

No valid reason exists for the Custodian's seizure of property subject to a non-enemy security interest.

POINT IV.

The Custodian is not entitled to interest from the date of demand until the date of the order directing the Bank to make payment.

The Act makes no provision for payment of interest or for penalties for non-compliance. The decisions cited by the Custodian in support of his contention that he is entitled to interest are not in point. Those

cases merely hold that any obligation to the United States bears interest from the date such obligation became due, even if the statute creating the obligation makes no provision for interest.

If a statute creates an obligation to the United States, interest will be awarded even though the statute is silent on the subject, providing the allowance thereof would be equitable. *Rodgers* v. *United States*, 332 U. S. 371.

In *Billings* v. *United States*, 232 U. S. 261, it was held that interest is recoverable on taxes which have been illegally withheld because the government is entitled to the immediate use of the money and, also, because an aggrieved taxpayer, who sues to recover the taxes which have been illegally exacted, may recover interest from the time of payment to the United States.

Should the Bank succeed in a Sec. 9 proceeding, it will not receive interest from the time of payment until the time of restitution. *Pfluger* v. *United States*, 121 F. 2d 732.

As was pointed out by the lower Court, this is not a proceeding to recover an obligation due to the United States, but to obtain payment of a disputed debt allegedly due to the enemy, and if the Bank was to succeed in a Sec. 9 suit in establishing its claim of set-off, the Custodian would have to return what he collected (R. 23).

The Custodian concedes that this proceeding is of a possessory character and that it does not adjudicate the rights of the Custodian or of the Bank.

Sec. 9 (a) of the Act provides that upon the institution of a suit for the recovery of moneys paid to the Custodian, such moneys shall be retained until a final judgment or decree is entered in said action.

The Custodian is, therefore, not entitled to interest between the date of his demand and the date of the order of the District Court as compensation for being deprived of the use of the moneys. Furthermore, at the time of the issuance of the turnover directive and the entry of the order directing payment (December 12, 1947), Congress had not, as yet, directed what use was to be made of the seized enemy property.

Prior to July 3, 1948 the seized property was to be merely held by the Custodian. On July 3, 1948 the Act was amended to provide that vested German and Japanese property shall not be returned to its former owners nor compensation be paid to them, but that the net proceeds of such property shall be paid into the Treasury (P. L. 896, 80th Congress, Second Session, July 3, 1948, Par. 12).

The vesting by the Custodian under the Act is tantamount to confiscation of the property of the enemy but such vesting is not a confiscation of the property rights of citizens (*Henkel* v. *Sutherland*, 271 U. S. 298).

In the instant case the Bank refused to comply with the Custodian's demand in reliance upon *Simon* v. *Miller*, *supra*.

In the absence of a statutory provision for a fine or penalty for non-compliance with the Custodian's demand, interest should not be awarded for non-compliance, if there is a reasonable ground therefor.

It has been held that, even where a statute provides for the awarding of interest where money is "withheld by unreasonable and vexatious delay of payment", interest will not be allowed if the debtor raised a plausible defense (*Adler v. Consumers Co.*, 152 F. 2d 696).

CONCLUSION.

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the cause remanded with directions to deny the Custodian's petition for an order directing the Bank to pay him the sum of $25,581.49 and to dismiss this proceeding.

Respectfully submitted,

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APPENDIX.

Trading with the Enemy Act, c. 106, 40 Stat. 411 (50 U. S. C. App. 156):

SEC. 17. [40 Stat. 425] The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary"